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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE TESLA, INC. SECURITIES
LITIGATION

Case No. 3:18-cv-04865-EMC

**DEFENDANTS' SUPPLEMENTAL
OPPOSITION TO PLAINTIFF'S
EMERGENCY MOTION *IN LIMINE* RE:
OPTIONS DAMAGES**

Date: TBD

Time: TBD

Location: Courtroom 5, 17th Floor

Judge: Hon. Edward Chen

1 Defendants respectfully submit this short supplemental memorandum to allay the Court's
2 concerns raised on Friday relating to Defendants' mid-trial emergency motion *in limine* (ECF No.
3 611). In short, (i) Defendants do **not** believe that it is impossible to calculate damages using actual
4 prices, merely that Plaintiff's chosen methodology is flawed because it fails to make proper
5 adjustments to but-for prices; and (ii) Defendants will **not** challenge the use of actual prices by
6 Plaintiff's experts. In addition, to avoid any concern about potential prejudice, Defendants will
7 refrain from referencing the prior *Daubert* motion practice or even asking Plaintiff's experts the
8 reason why they changed their methodology.

9 As Defendants stated on Friday in response to the Court's question, we believe there are
10 ways that Professor Heston could have tried to account for the "the microeconomic problem." Trial
11 Tr. at 1520:5. In his Supplemental Report, Professor Seru states: "Professor Heston should have
12 proposed a methodology to estimate but-for prices that takes into account the fact that options with
13 different strikes or option type (call or put) have different implied volatilities." ECF No. 611-3 at
14 10, ¶ 21. Equally important, both Professor Heston and Dr. Hartzmark testified at deposition that
15 they believe any "microeconomic problem" would be minimal and that their proposed methodology
16 is still reasonable. In other words, Plaintiff's experts are prepared to defend their methodology at
17 trial regardless. *See* Heston 1/3/2023 Deposition Tr. at 62:20-63:24 ("What impact will market
18 noise have on damages estimates derived using your latest methodology? A. Well, when you say
19 "market noise", that could be bad execution. . . . But the magnitude of the what I call the
20 microstructure noise is on the order of half the bid-ask spread, and it's not unreasonable compared
21 to the impact or price fluctuations experienced by many options investors."); Hartzmark 1/9/2023
22 Deposition Tr. at 466:16-467:14 ("Q. How did you attempt to try and eliminate issues associated
23 with illiquidity in the market? . . . A. . . . in the end, I don't think that has any sizeable or scientific
24 measure or statistically-significant difference on aggregate damages.").

25 As Defendants made clear on Friday and in their Opposition (ECF No. 616 at 1:17-18; 3:4-
26 5), Defendants do not intend to argue or even suggest that Plaintiff's experts should not have used
27 actual option transaction prices. Rather, Defendants simply intend to test the assertion by Plaintiff's
28 experts that the "market noise" is minimal and their methodology remains sound despite not making

1 adjustments for microeconomic issues, such as the bid/offer spread. That is certainly fair ground
 2 for cross examination, even if it is not a sufficient basis to preclude the testimony altogether under
 3 *Daubert*. In fact, the Court itself has repeatedly stated—including in denying Defendants’ request
 4 for a renewed *Daubert* motion—that Defendants will be “free to cross-examine” Plaintiff’s experts
 5 about their changes, especially when they were curable. 1/4/2023 Tr. at 62:2-3 (“You’re certainly
 6 free to cross-examine.”); 1/13/2023 Tr. at 174:19-175:1 (“There are certainly a lot to talk about,
 7 certainly many grounds for cross-examination, grounds for questioning the methodology here. . .
 8 And so I’m going to leave it to the lawyers and their dueling experts to -- to battle it out.”); 1/27/2023
 9 Tr. at 1525:3-6 (“THE COURT: All right. Then I will say that that would be a proper basis of cross
 10 examination and impeachment, but a general approach that you cannot -- there is no inherent way
 11 of using actual numbers. That would be a problem.”); *Id.* at 1525:20-23 (“THE COURT: So to be
 12 clear, I’m going to allow cross examination on the methodology and on problems that essentially
 13 that the Defendants say could have been done but weren’t done here...”).

14 Although Defendants believe they would ordinarily be well be within their right to do so,
 15 they will not even question Plaintiff’s experts about the reasons they made changes to their
 16 methodology.¹ But it is hornbook law and standard practice that Defendants should be entitled to
 17 cross-examine Plaintiffs’ experts about their prior methodology and what Defendants’ believe were
 18 curable flaws in the current one. *See In re TMI Litig.*, 193 F.3d 613, 687 (3d Cir. 1999), amended,
 19 199 F.3d 158 (3d Cir. 2000) (“If Shevchenko’s methodology did change to meet *Daubert* challenges,
 20 those changes strike at the heart of Shevchenko’s credibility as a witness and the weight to be
 21 afforded his testimony.”); *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 2014 U.S. Dist. LEXIS 24506, at
 22 *58 (N.D. Ca. Feb. 25, 2014) (“[T]he past methodologies of Apple’s experts are highly probative
 23 impeachment evidence that a fact-finder will consider in assessing the weight a fact-finder may
 24 choose to give the experts in the instant litigation.”); *Harris v. Steelweld Equip. Co.*, 869 F.2d 396,
 25 404 (8th Cir. 1989), holding modified by *Rush v. Smith*, 56 F.3d 918 (8th Cir. 1995) (“The cross-
 26 examination as to Mr. Kutchback’s prior opinions and the consequences thereof are clearly relevant

27
 28 ¹ This should obviously apply both ways. Plaintiffs’ experts should not be allowed to
 reference such reasons either.

1 to show credibility and/or bias.”); *Crouch v. Honeywell Int’l, Inc.*, 2015 WL 13547448, at *3 (W.D.
 2 Ky. Nov. 19, 2015) (accord); *Meharg v. I-Flow Corp.*, 2009 WL 3032327, at *6 (S.D. Ind. Sept. 18,
 3 2009) (accord).

4 Denying Defendants the opportunity to examine Plaintiff’s experts on their prior opinions
 5 would be plain error and highly prejudicial. *See U.S. v. Tory*, 52 F.3d 207, 210 (9th Cir. 1995)
 6 (reversing because, among other things, the trial court improperly excluded evidence of prior
 7 inconsistent statements); *cf. In re Hanford Nuclear Rsr. Litig.*, 534 F.3d 986, 1016 (9th Cir. 2008)
 8 (holding that the district court did not abuse its discretion in permitting defendants to cross-examine
 9 plaintiff’s expert with testimony given in a previous bellwether trial where the expert changed his
 10 analysis before the next trial); *U.S. v. Segundo-Orellana*, 541 F. App’x 751, 754 (9th Cir. 2013)
 11 (“The prosecutor’s cross-examination of the defense expert regarding his testimony in a prior
 12 lawsuit was probative of the expert’s character for truthfulness and thus appropriate”). The Court
 13 itself acknowledged Defendants’ right to question Plaintiff’s experts about how their methodology
 14 changed and why the resulting damage numbers are so different when it granted Defendants’ request
 15 for a one hour deposition of Dr. Hartzmark. 1/4/2023 Tr. at 62:2-3. Plaintiffs’ motion *in limine*
 16 should be denied as untimely, unwarranted, and meritless.

17
 18 DATED: January 29, 2023

Respectfully submitted,

19 QUINN EMANUEL URQUHART & SULLIVAN, LLP

20 By: /s/ Alex Spiro

21 Alex Spiro (appearing *pro hac vice*)

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 23 *Robyn Denholm, Ira Ehrenpreis, Antonio J. Gracias,*
 24 *James Murdoch, Kimbal Musk, and Linda Johnson Rice*